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August 27, 2012

Jeff S. Jordan, Esq.
Supervisory Attorney
Complaints Examination & Legal Administration
Office of General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 6603

Dear Mr. Jordan:

On behalf of Respondents Ben Chandler for Congress and R. Wayne Stratton, Treasurer, we write in response to the Complaint in MUR 6603.

This Complaint involves an issue advertisement sponsored by Patriot Majority USA more than 90 days before the next election. The advertisement discussed Representative Ben Chandler's record on Medicare issues, and encouraged him to protect the program while balancing the budget. Solely because the advertisement uses fleeting clips of Representative Chandler that the campaign had publicly posted on the Internet, the Complaint claims that the advertisement was coordinated. There is no merit to the Complaint, and the Commission should immediately dismiss it.

STATEMENT OF FACTS

Representative Ben Chandler is a Member of Congress serving Kentucky's 6th District. He won nomination for re-election on May 22, 2012, and is a candidate in the November 6, 2012 general election. Ben Chandler for Congress is his principal campaign committee, and Mr. Stratton is its treasurer.

On June 18, 2012 – after the primary, but more than 90 days before the general election – Patriot Majority USA began airing a grassroots lobbying advertisement that discussed Representative Chandler's efforts to preserve Medicare in its current form. This advertisement coincided with

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ANCHORAGE • BEIJING • BELLEVUE • BOISE • CHICAGO • DALLAS • DENVER • LOS ANGELES • MADISON • NEW YORK
PALO ALTO • PHOENIX • PORTLAND • SAN DIEGO • SAN FRANCISCO • SEATTLE • SHANGHAI • TAIPEI • WASHINGTON, D.C.

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an historic debate in Washington, D.C. and throughout the country over the future direction of the Medicare program.

Patriot Majority USA paid for the advertisement in its entirety, which uses a few fleeting moments of video footage that is publicly available on Ben Chandler for Congress's YouTube channel. The Complaint states that the video footage was available on the Internet for less than a day, which is untrue. All of the video footage from the campaign used by Patriot Majority USA was posted on Ben Chandler for Congress's YouTube channel prior to the advertisement's distribution and remains there at this writing.¹ From this, the Complaint tries to argue that the advertisement was coordinated under Commission rules, and that it was a contribution to Representative Chandler's campaign. This argument is without merit, and lacks any support in law. The Commission should dismiss the Complaint.

ARGUMENT

To be coordinated, an advertisement must meet a three-part test. It must be paid for by a third party; meet at least one of the content standards in 11 C.F.R. § 109.21(c); and meet at least one of the conduct standards in 11 C.F.R. § 109.21(d).² This advertisement only meets the first part of the test – it was paid for by a third party. The Complaint alleges no other facts to meet any content or conduct standard.

A. The Complaint Alleges None of the Content Necessary for Coordination

No content standard has been met in this case. An advertisement meets a content standard if it either: (1) is an electioneering communication; (2) disseminates, distributes or republishes campaign materials; (3) contains express advocacy; (4) is a public communication that references a Congressional candidate in his jurisdiction within 90 days of an election;³ or (5) contains the functional equivalent of express advocacy.⁴ Because the Complaint does not allege that the advertisement was an electioneering communication, or was otherwise disseminated within 90 days of any election, neither content standards (1) nor (4) is met, by the Complaint's own reckoning.

¹ Available at http://www.youtube.com/user/reelectbenchandler?feature=results_main.

² 11 C.F.R. § 109.21(a) (2012).

³ When it wrote the coordination rules, the Commission understood from carefully developed record evidence that, "beyond 90 days, the amount of candidate advertising approaches zero." *Coordinated Communications*, 71 Fed. Reg. 33,190, 33,194 (2006). The Commission sought to avoid a rule that "would unnecessarily capture a substantial amount of speech that is unrelated to elections, thereby raising substantial First Amendment issues." *Id.* at 33,199.

⁴ 11 C.F.R. § 109.21(c).

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The Complaint implies that the advertisement was an "independent expenditure," and hence that it advocated Representative Chandler's election.⁵ But the advertisement contained neither express advocacy nor its functional equivalent. It used no phrase to urge election or defeat. Moreover, it could readily be understood as informing the public about important issues, and encouraging support for the sponsor's and Representative Chandler's shared position on those issues. Hence, the advertisement does not meet content standards (3) or (5).⁶

The Complaint stands or falls entirely on its allegation that the advertisement republished Representative Chandler's campaign materials.⁷ As a matter of law, it falls. When the Commission wrote the coordination rules, it incorporated an exception that allows a sponsor to use a brief quote of candidate materials while expressing its own views.⁸ Here, Patriot Majority USA used its own text, graphics, audio and narration to deliver its own message, of which silent footage of Representative Chandler was only an incidental part. The advertisement was clearly Patriot Majority USA's own speech, not the parroting of any campaign message, and hence did not meet content standard (2).⁹

Because the advertisement meets none of the five essential content standards, the Complaint's coordination claim fails.

B. The Complaint Alleges None of the Conduct Necessary for the Campaign to Have Received a Contribution

Even if the Complaint did allege that even one content standard was met, it still alleges none of the conduct necessary for coordination. It is premised entirely on a mistake of fact: that the

⁵ See Complaint at 1-2; 11 C.F.R. § 100.16(a).

⁶ See Statement of Reasons of Commissioners Walther, Petersen, Bauerly, Hunter and McGahn, MUR 6044, at 5 (holding that an issue advertisement discussing Mississippi Governor Ronnie Musgrove's fiscal record "could be read to highlight Musgrove's accomplishments as governor of Mississippi as an example that current Congressional legislators should follow" and hence did not qualify as express advocacy).

⁷ See 11 C.F.R. § 109.21(c)(2). See also 2 U.S.C. § 441a(a)(7)(B)(iii) (defining republication).

⁸ 11 C.F.R. § 109.23(b)(4).

⁹ See Statement of Reasons of Commissioners Von Spakovsky and Weintraub, MUR 5743, at 4 (finding that republication did not occur when candidate images "comprise only a small portion of the" communications, "and are surrounded by [the sponsor's] own text and design."). See also Statement of Reasons of Commissioners Hunter, McGahn and Petersen, MUR 5879, at 8 (finding that the use of "background video" in a statement of the sponsor's own views did not rise to the level of republication); Statement of Reasons of Commissioners Hunter, McGahn and Petersen, MUR 6357, at 4 (finding no republication when candidate images "are incorporated into a communication in which [the sponsor] adds its own text, graphics, audio and narration to create its own message.").

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video footage used by Patriot Majority USA was available "for less than 24 hours," when in fact it remains in the public domain on the campaign's YouTube channel.¹⁰ The Complaint contains no other facts to support an allegation of coordination. An allegation of some such conduct is necessary for the Complaint to proceed against the campaign, because even if the advertisement had republished Representative Chandler's campaign materials, he would not automatically receive an in-kind contribution as a result; one of the conduct prongs must still be met.¹¹

CONCLUSION

For the foregoing reasons, the Complaint alleges no violation of Commission regulations, and MUR 6603 should be dismissed.

Very truly yours,



Brian G. Svoboda
Emily R. Eisenberg
Counsel to Ben Chandler for Congress and R. Wayne Stratton, Treasurer

¹⁰ Available at http://www.youtube.com/user/reelectbenchandler?feature=results_main.

¹¹ See 11 C.F.R. § 109.23(a) ("The candidate who prepared the campaign material does not receive or accept an in-kind contribution ... unless the dissemination, distribution, or republication of campaign materials is a coordinated communication under 11 C.F.R. § 109.21...").